AND
BRIEFS.

FILED
JUL 27 2016
OFFICE OF THE CLERK

No. 15-214

In the

Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Writ of Certiorari to the Court of Appeals of the State of Wisconsin

PETITIONERS' REPLY BRIEF ON THE MERITS

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QUESTION PRESENTED

In a regulatory taking case, does the "parcel as a whole" concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

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INTRODUCTION

In deciding this case below, the Wisconsin appellate court proclaims a

> well established **rule** that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein.

Pet. App. at A-11 ¶ 20 (emphasis added). In its opposing briefs, Respondents do not even attempt to defend this extreme rule. Rather, the State of Wisconsin and St. Croix County avoid the Wisconsin rule, labeling it "dicta" as they seek to affirm the lower court "instead on the narrower grounds described herein." Brief for Respondent State of Wisconsin at 40; Brief for Respondent St. Croix County at 40-41.

As a starting point, the Court should agree with all the parties, as well as amici, that the Wisconsin rule is not supportable. *See, e.g*, Brief of the States of Nevada, et al. as Amici Curiae in Support of Petitioners; Brief of Amici Curiae National Association of Home Builders, et al. (persuasively setting forth significant policy concerns with the broad Wisconsin *per se* rule). The Respondents' choice to not defend the rule should be followed by the Court's reversal of the decision below. At a minimum, this Court should vacate the decision below and remand with direction from this Court regarding the correct rule. In this case, that should be applying the rule from *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 130 (1978), recognizing that the parcel as a whole to be used as the denominator in the takings inquiry is the full fee simple interest to the single parcel alleged to be taken. In this case, that is Lot E.

In avoiding the rule applied by the lower court, St. Croix County instead attempts to pull this Court into factual disputes that address the merits of the takings claim. For example, much energy is spent discussing the County's interpretation of its expert witness appraiser, and asserting that the Murrs have not really suffered much economic injury. Of course, the Murrs' appraiser sharply disagrees with the County's appraiser. The Murrs' appraisal shows a 90 percent decrease in value for Lot E, a decrease from $410,000 to $40,000. Joint Appendix (JA) 113-14. But such factual disputes regarding appraisal methods and the degree of economic impact are subjects properly left for determination on remand.

The question here is not the magnitude of economic injury, but what parcel of property should be considered the "relevant parcel" for applying the takings inquiry. The ultimate issue of whether, or not, there is a taking, or what level of economic impact has occurred, is not before the Court. Rather, the question presented is more narrow, *i.e.*, what parcel of land is to be considered in the takings analysis?

ARGUMENT

I

THE RELEVANT PARCEL IN THIS CASE IS "LOT E"

The Murrs allege a taking of only their investment parcel, vacant Lot E. They contend that Lot E is the relevant parcel for considering whether there has been a denial of all economically viable use, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), or a taking based on the ad hoc, multi-factor analysis described in *Penn Central*.

In the Petitioners' opening brief, the Murrs demonstrated that this Court's "parcel as a whole" concept focuses on the entire single parcel. *Penn Central*, 438 U.S. at 130 ("'Taking' jurisprudence does not divide a single parcel into discrete segments."); *see* Petitioners' Brief on the Merits at 13-24. Focusing on the single parcel, the Court has rejected arguments to segment, or carve out, particular interests in property in order to find a taking of that specific and narrow interest.

Similarly, the Court has not favored the Wisconsin approach of aggregating nearby parcels held by the same owner, calling that approach extreme and unsupportable. *Lucas*, 505 U.S. at 1016 n.7. Rather, the standard rule derived from *Penn Central*, *Lucas*, and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), is that the Court focuses on the single parcel that comprises the entire fee simple interest.

Neither Wisconsin or St. Croix County mount an argument against that analysis. Rather, they contend that Lot E and Lot F are actually a single parcel, and that, ironically, it is the Murrs who are trying to segment that single parcel into two parcels. In Wisconsin's words:

> Petitioners' efforts to distinguish between segmenting a single parcel (which *Penn Central* prohibits) and aggregating separate parcels (which *Lucas* explained is "unsupportable") thus cuts entirely against their argument because this is a segmentation case, not an aggregation case.

Brief of Wisconsin at 26.

The argument hinges on two ideas. First, Wisconsin refers to *Lucas* footnote 7 where the Court suggested that the answer to defining the relevant parcel "may lie in how the owner's reasonable expectations have been shaped by the State's law of property." *Lucas*, 505 U.S. at 1016 n.7. Wisconsin submits that this "approach suggested by *Lucas* is the proper method for identifying the parcel." Brief of Wisconsin at 23.

Building on this theme, Wisconsin then contends that the "State's law of property" includes "all" of the State's property laws. Brief of Wisconsin at 31 ("as shaped by *all* of a State's laws") (italics by Wisconsin). Wisconsin points out that "all" of the State's property laws include the 1975 enactment of the ordinance that has triggered the alleged taking. As argued by Wisconsin:

> It is *all* of Wisconsin's laws that "shape" property owners' objective "reasonable expectations." *Lucas*, 505 U.S. at 1016 n.7. Under that complete view of state law, the lots are one parcel.

Brief of Wisconsin at 40.

This argument fails both legally and factually. The Murrs appreciate that Respondents do not dispute that the "single parcel" is the proper standard derived from *Penn Central*. Indeed, as discussed below, that should be the presumption. This is particularly true in a case such as this, where the claim involves ordinary real property, fee title to a residential lot. But the attempt to claim that Lot E and Lot F are legally and factually a single parcel, and therefore should be the

relevant parcel for takings purposes, is not persuasive and will not withstand scrutiny.

A. *Lucas* Footnote 7 Strongly Supports the Murrs' Position That the Fee Simple Title to Lot E Is the Relevant Parcel

In relying on footnote 7 of *Lucas*, Wisconsin quotes only the first part of the identified sentence, as follows:

> The answer to th[e] difficult question of identifying the relevant parcel "may lie in *how the owner's reasonable expectations have been shaped by the State's law of property.*"

Brief of Wisconsin at 23 (quoting *Lucas*, 505 U.S. at 1016 n.7 (italics added by Wisconsin)). But most significantly, the sentence continues to explain what the Court meant by the "State's law of property":

> . . . shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to *the particular interest in land* with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law.

Id. (Italics added.) By ignoring the second half of the sentence, the State badly misconstrued the phrase "the State's law of property." This Court did not suggest that "all" of Wisconsin zoning law is used to define the relevant parcel. Rather, the reference is to State law

that provides legal recognition and protection to a **particular interest in land**. In *Lucas*, the particular interest was fee simple title. That is the same interest in land that the Murrs assert. They own fee simple title to Lot E. JA 6 (verified complaint). As this Court recognizes, a fee simple is a particular property interest with a long history of protection.

Wisconsin likewise secures and protects the fee simple estate. Wis. Stat. § 700.02 (recognizing property interest in fee simple absolute); *Zillmer v. Landguth*, 69 N.W. 568, 569 (Wis. 1896) (suspending power of alienation is repugnant to fee simple estate and void); *In re Budd's Estate*, 105 N.W.2d 358, 362 (Wis. 1960) (holder of fee simple estate "can lawfully sell, transfer, convey, assign, mortgage or alien" the interest).[1]

Correctly understood, *Lucas* footnote 7 provides strong support that Lot E should be the relevant parcel in this case. That lot was lawfully created through a certified survey map recorded in 1959 as a separate, discrete, and independent legal parcel. JA 82. The Murrs' parents purchased the fee title in 1963. JA 6. As acknowledged in *Lucas*, and well supported in Wisconsin, the fee simple interest has a rich tradition of protection at common law. Accordingly, to the extent *Lucas* footnote 7 provides guidance to answer the relevant parcel question, that guidance points

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[1] To further underscore this protection, Wisconsin has enacted a new statute that provides that a political subdivision "may not prohibit or unreasonably restrict a real property owner from alienating any interest in real property." Wis. Stat. § 700.28 (enacted by 2015 Wisconsin Act 391) (effective Apr. 28, 2016). Under the new statute it appears that St. Croix County could not have stopped the Murrs from selling their interest in Lot E.

directly at identifying the relevant parcel as the fee simple interest in Lot E.

B. Lot E and Lot F Remain Today as Separate, Single, and Discrete Parcels

Respondents argue that Lots E and F are actually a single parcel today, and therefore the combined lots should be the standard, presumed, relevant parcel under *Penn Central*. That argument is based on a fiction. Those parcels have not been legally joined.

The 1975 ordinance is a *zoning measure* that restricts uses and defines minimum lot sizes.[2] It does not eliminate lot lines. It is a *land use ordinance* that precludes the sale and development of Lot E, but the lot lines that distinguish the two parcels remain in place.

To alter lot lines, Wisconsin has formal procedures to be followed. Specifically, when a lot is created by a certified survey map pursuant to Wis. Stat. § 236, and recorded pursuant to § 236.34(3), that land is required, for all purposes, to be described by reference to the recorded survey. The statute provides:

> When a certified survey map has been recorded in compliance with this section, the parcels of land in the map shall be, for all

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[2] If allowed to be developed, Lot E has approximately one-half acre of building area. Pet. at 5. The building site is located in the level area at the top of the bluff, far back from the shoreline. Pet. App. A-12 (residence could be built at the top of the bluff). This upper area is accessed by a paved road with several other homes on the neighboring parcels. JA 33; JA 51. The upper level area is serviced with electricity, natural gas, and telephone. JA 34. Despite having a very suitable building site, Lot E is defined as "substandard."

> purposes, including assessment, taxation, devise, descent, and conveyance, as defined in 706.01(4), described by reference to the number in the survey, lot or outlet number, the volume and page where recorded, and the name of the County.

Wis. Stat. § 236.34(3). Accordingly, for all purposes, including subsequent conveyance, Wisconsin law relies on the recorded survey to identify the lot. In this case, the survey does not reflect any elimination of the lot line between Lots E and F, nor the creation of a new, single parcel, as suggested by Respondents.

Wisconsin law allows the exterior boundaries of Lot E to be altered by a new certified survey map that is also recorded (Wis. Stat. § 236.34(1) (bm)), or the original certified survey map can be vacated by a court. As with other methods for altering lot lines, vacation of a certified survey map is by application of the owner. Wis. Stat. § 236.34(4). In addition, any order vacating a certified survey map must also be recorded. Wis. Stat. § 236.44.

Significantly, in the present case, there has been no recorded change to the boundaries of Lot E. This deficiency is significant. The whole purpose of the recording statutes is to track title to legally described parcels to facilitate conveyances and protect bona fide purchasers.

> The [Wisconsin] recording statute contemplates that relevant instruments will be properly filed so that the complete title history of a parcel can be quickly determined from the public record . . . .

In re Couillard, 486 B.R. 466, 472 (Bankr. W.D. Wis., 2012). This ensures a clear and certain system for conveyance of property. *Id.* *See also* Wis. Stat. § 706.08(1)(a).

> [T]he purpose of the recording statute is to render record title authoritative to protect a purchaser who relies on the record and is a purchaser in good faith and for valuable consideration.

Kordecki v. Rizzo, 317 N.W.2d 479, 482 (Wis. 1982). Here, there has been no recorded survey, deed, or other instrument to effectuate an actual modification of the legal description and geographic boundaries of Lot E. Accordingly, Lot E and Lot F, while restricted in use, remain as separate and distinct parcels.

It should be no surprise that the minimum lot size requirement does not actually alter the boundary lines of any specific parcel. A minimum lot size is a general zoning requirement that is enacted as a legislative policy. It regulates *the use* of existing lots. In contrast, the laws for dividing land into lots (such as subdivisions and certified survey maps), are administrative in nature. That process involves a specific application to the particular land being subdivided.

> Zoning regulates the use of land and buildings, the intensity (or density) of that use, and the bulk and height of structures involved. . . . Zoning governs the lots at a small scale, specifying the minimum criteria that lots must meet—usually just minimum size requirements. . . .

> The most important legal difference between zoning and subdivision is in the administration of the two regulatory programs. The change of zoning necessary for many new developments is typically an act of the local legislative body. . . . In contrast, the regulation of subdivisions is entirely administrative and involves comparing the proposed subdivision to standards set forth in adopted regulations.

13 Richard R. Powell, *Powell on Real Property*, § 79D.03[2] (Michael Allan Wolf ed., 2013). The 1975 enactment establishes policies and standards that restrict uses, but it is not a site-specific action that eliminates lot lines of particular parcels.

The inability of the 1975 ordinance to actually, or legally, eliminate lot lines is also revealed by the chain of title in the present case. Respondents point out that in 1982, the parents transferred title for Lot F (the cabin parcel) from their plumbing company and placed it in their personal names. Since title to Lot E (the investment parcel) was already in the parents' names, these adjacent parcels came under common ownership. *See* Brief of Wisconsin at 18 n.2. According to the argument advanced by Respondents, the lots should have merged, and the lot line separating the two parcels extinguished, at that time.

But after 1982, Lot F was conveyed *without including Lot E* as part of the conveyance. Specifically, in 1994, the parents conveyed the cabin parcel to their children, and they retained ownership of the investment parcel. If the parents' common ownership of both parcels between 1982 and 1994 eliminated the lot line, the cabin parcel could not have been

independently conveyed to the Murr children in 1994. Thus, regardless of common ownership, Lots E and F did not legally become a single parcel. As described above, the 1975 ordinance restricts use, but it does not alter boundary lines. An alteration of boundary lines needs to be accomplished through an administrative process specific to the particular property, something that has never occurred. The parents' 1994 conveyance may have violated the use restrictions of the ordinance, but it also confirms that Lots E and F remained separate parcels.[3]

In summary, the Respondents' primary argument is based on a fiction that Lot E and Lot F were formally converted into a single parcel. The Respondents were compelled to pursue that strategy because *Penn Central*, *Lucas*, and *Tahoe-Sierra* are clear that the relevant parcel for takings analysis purposes is the single parcel. Because Respondents cannot persuasively refute that contention, they resort to arguing that Lots E and F are a single parcel. But, as shown here, that argument fails on the law and the facts. Accordingly, the single parcel, Lot E, is the relevant parcel for the takings inquiry.

C. The Regulations Themselves Do Not Define the Relevant Parcel

According to Respondents, because the Murr children took title after the enactment of the

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[3] The characterization of Lots E and F as being "effectively merged" is also a tacit admission that the lots are not "actually" merged. Rather, the ordinance restricts use so that the lots cannot be independently sold or developed, but does not legally merge the lots. In other words, the two parcels are being treated by the ordinance as though they are one parcel, when in fact they are separate parcels.

ordinance, they could not have any reasonable expectation to independently sell or develop Lot E. After all, Lot E was now defined as "substandard," and its independent sale or development was prohibited. Of course, after seeking a final decision on how the ordinance would be applied, and also being denied a variance, it is likely true that the Murrs would not have any further expectation to independently sell or develop Lot E. *But that is the gravamen of the takings claim itself*—not a basis for defining "property."

The use restrictions challenged for takings liability cannot also define what "property interests" are at issue—the question here. If this were so, there could never be a taking (or even a takings claim) because the regulations would simply strip the owner of any protected property interest. To the extent pre-existing regulations and rules (and expectations based on them) help define the relevant parcel, the only proper place to look is to antecedent understandings outside of the challenged regulations. Traditional understandings of property law provide the primary lens and the primary expectation. The nature and timing of challenged regulations may be relevant to whether a taking occurs, but they cannot define the property subject to the analysis.

To the extent it is even relevant, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) undercuts the notion that changed expectations resulting from enactment of the challenged ordinance can define the takings claim, or the relevant parcel. Justice Kennedy, writing for the majority, framed the issue as follows:

> The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems

> to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment backed-expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.

Palazzolo, 533 U.S. at 626. The Court strongly rejected that theory.

> Were we to accept the State's rule, the post-enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme and unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Id. at 627.

Under this precedent, the Murr siblings have the same right to seek compensation under the Takings Clause as their parents. Indeed, the transfer of title from the parents to the children vests the same property interest as was held by the parents. *Id.* at 629 (citing *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 n.2 (1987)). In the Murrs' case, that is the fee simple interest to Lot E.

> The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was

> possessed prior to the regulation. The State may not by this means secure a windfall for itself.

Id. at 627.

Here, the Murrs' parents purchased fee simple title to distinct and separate parcels. Inherent in that title is the right to sell, convey, or otherwise alienate the entire fee simple interest. As shown above, Wisconsin common law has long protected that right. *Zillmer*, 69 N.W. at 569; *In re Budd's Estate*, 105 N.W.2d at 362.

It is for this reason that the Murr family was "quite flabbergasted" to learn that the regulations precluded the ability to independently sell Lot E. *See* Petitioners' Brief on the Merits at 27; JA 93. To strip away that right, and claim that the Murr siblings could have no reasonable expectation because the restrictions were already enacted, is to put an expiration date on the Takings Clause, as described in *Palazzolo*.

The rationale in *Palazzolo* included consideration of the practical difficulties in filing a takings claim under the ripeness doctrine. Before filing a takings claim, a potential claimant must first secure a final decision of how the regulations will be applied. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). This is not always easy to do, and typically involves substantial effort and time. *See, e.g.*, *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999). In rejecting the "notice" rule, the *Palazzolo* Court explained:

> A challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied . . . . It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to ripen were not taken, or could not have been taken, by a previous owner.

Palazzolo, 533 U.S. at 628. That is precisely the situation here. When the regulations were enacted in 1975, the Murrs' parents had no reason to apply for development at that time. It is undisputed that they were holding Lot E as an investment, and simply left the property vacant. Petitioners' Brief at 3-4; JA 89. The property remained vacant and, after it was passed down to the now grown children, they proceeded to apply for a variance and secure a final decision on how the restrictions would be applied. Petitioners' Brief at 7-8. Having reached the point of a ripe takings claim, they should not now be denied relief on the ground that their acquisition of title was post-enactment of the 1975 restrictions.[4]

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[4] Respondents also suggest that perhaps the minimum lot size requirement is a background principle of property law, and thus insulated from the takings inquiry. That notion was also clearly rejected in *Palazzolo*.

> It is asserted here that *Lucas* stands for the proposition that any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment. . . . A regulation or common-law rule cannot be a background principle for some owners and not for others. A law does not become a background principle for subsequent owners by enactment itself.

(continued...)

Nor should the relevant parcel be defined by the very regulations challenged in the Murrs' takings claim. The relevant parcel is defined by traditional understandings of property law, understandings that are not based on the challenged regulation itself, but based on the protection of the particular property interest. In this case, that is the fee title to Lot E.

II

THIS COURT SHOULD CONFIRM THE PRESUMPTION THAT FEE TITLE TO EACH SINGLE PARCEL IS THE DENOMINATOR FOR THE TAKINGS ANALYSIS

Wisconsin points out that since the 16th century, English land holdings are defined by "metes and bounds" descriptions. And the "Greeks labeled boundaries as 'sacrosanct.'" Brief of Wisconsin at 3 n.2. Wisconsin even cites the Bible for the long pedigree of respect for boundary lines: "Do not move your neighbor's boundary stone . . ." *Id.* (citing Deuteronomy 19:14).

With those long-held underpinnings, this country employs a system of deeds, legal descriptions of physical boundaries, and recording that is critical to the ability to buy and sell property. Fee simple title is typically conveyed by deed, which includes a description of the property boundaries, either by metes and bounds, or by reference to "lot" or "block" of a recorded plat, or other legal descriptions that identify the geographic boundaries of the parcel. Those deeds are recorded and provide a system of title search that

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[4] (...continued)
Palazzolo, 533 U.S. at 629-30.

is necessary to modern title insurance and the efficient conveyance of property.

This system requires defining the interest in property. Defining the property interest includes the geographic dimensions, *i.e.*, boundary lines. Moreover, it is the full definition of the property interest that this Court explained constitutes the "parcel as a whole" in the regulatory takings analysis. Justice Stevens, writing for the majority in *Tahoe-Sierra*, explained:

> An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. *See* Restatement of Property ¶¶ 7-9 (1936). Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole."

Tahoe-Sierra, 535 U.S. at 331-32.

This Court should continue to adhere to the significance of horizontal geographic boundaries. Vertical segmentation was rejected in *Penn Central*, where the air rights could not be carved out from the entire fee interest. Likewise, temporal segmentation was rejected in *Tahoe-Sierra* in favor of viewing the relevant property interest as the entire, full fee interest. Now, the Court has before it the horizontal interest, *the physical boundaries*. In the same manner as its prior rulings, the Court should rule again that the single parcel is the relevant parcel.

In light of *Penn Central* and *Tahoe-Sierra*, the Court should confirm that the standard rule, or

presumption, is that the entire defined property interest, including all its geographic and temporal dimensions, should be the parcel as a whole in the regulatory takings analysis. In the Murrs' case, that is Lot E.

By confirming the presumption, which is grounded in traditional concepts of property law and *Penn Central*, the Court offers guidance and some degree of predictability to property owners, regulators, and the lower courts. Because a presumption may be rebutted, courts and local governments retain some flexibility. In any particular case, landowners or government may argue that the peculiar facts and circumstances warrant some degree of segmentation or aggregation. However, the party seeking to segment a lesser interest, or aggregate other parcels, should have the burden of proof to show that the facts warrant such unorthodox treatment.

In order to overcome the presumption, the test should be the familiar principle of fairness and justice which underlies the Takings Clause. *Arkansas Game and Fish Commission v. United States*, __ U.S. __, 133 S. Ct. 511, 518 (2012) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).[5]

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[5] The amicus brief submitted by the United States argues that the relevant parcel should be determined on a case-by case basis, with ad-hoc consideration of a variety of factors. While that approach maintains flexibility, it does not provide guidance. Even the State of Wisconsin rejects that approach, calling it unpredictable, subjective, and a hodgepodge that produces dis-uniformity and lack of clarity. Brief of Wisconsin at 35.

III

FAIRNESS AND JUSTICE SUPPORT A DETERMINATION THAT THE MURRS' LOT E SHOULD BE THE RELEVANT PARCEL IN THIS CASE

There is no factual reason in this case to deviate from the standard rule that Lot E, as the single parcel alleged to be taken, should be the relevant parcel for the takings inquiry.

Lot E and Lot F were created as separate and distinct parcels. The Murr family acquired the parcels at different times, by different deeds, and for different purposes. Petition at 3-5. The parcels have never been developed together, and it is undisputed that the investment parcel, Lot E, remains vacant to this day. Petitioners' Brief at 3-4; JA 89.

Nor does the grandfather clause provide any reason to combine Lots E and F for purposes of the Takings Clause. Rather, the operation of the grandfather clause underscores the unfair treatment experienced by the Murrs.

The reason a grandfather clause exists is to provide relief to property owners when regulations change. A legal and conforming lot of record may be rendered an illegal building site by enactment of reduced minimum lot size requirements. To avoid the harsh result, a grandfather clause exempts legal pre-existing lots of record. As recognized by Respondents, without a grandfather clause, the regulating government would be subject to takings claims.

> Indeed, if a State sought to change unexpectedly its state law treatment of land,

> without providing a grandfather clause to protect settled expectations under *ex ante* state law, this change could itself be challenged under the Takings Clause.

Brief of Wisconsin at 36.

In the present case, the grandfather clause provides the relief necessary for many land owners. Lot E was a legal lot of record and, normally, it could be sold or developed under the grandfather clause exception. But here, the ordinance has an exception to the exception. Petitioners' Brief at 6; JA 77. If the owner of Lot E happens to also own the adjoining lot, then the grandfather clause does not apply. That is the Murrs' situation.

There is no reason that the grandfather clause should not apply generally. If the harsh treatment is sufficient to warrant a grandfather clause, then it should be applied to all owners holding pre-existing legal lots of record. It is fundamentally unfair, to have a rule that a lot may be purchased and developed by any person, except the owner of the neighboring land.

St. Croix County suggests that the Murrs can retain value in Lot E through development with Lot F. Perhaps that is true. Perhaps a larger house, an estate, with substantial beach frontage derived from both lots, and more privacy, might be attractive to some people. But such assertions about potential economic values go to the merits of a takings claim, or to the level of compensation. Perhaps the economic impact to Lot E is not the 90 percent decrease in value determined by the Murrs' appraisal (JA 113-14), but is something less. That battle between experts, however, is a factual dispute that may be resolved on remand.

At bottom, there is no reason to depart from the standard rule that the single parcel alleged to be taken, Lot E, is the proper unit for the takings inquiry.[6]

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[6] Amici WISCONSIN COUNTIES ASSOCIATION, et al., raise several inapt procedural arguments. They argue that (1) this Court should decline to address the constitutional "relevant parcel" question because independent state law grounds offer a basis to resolve the underlying dispute and/or because (2) the Murrs' federal takings claim is not "ripe" for review. However, the parties have raised neither of these issues and the courts below did not pass on them. They are therefore not before this Court. *F.T.C. v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 1010, n.4 (2013) ("Because this argument was not raised by the parties or passed on by the lower courts, we do not consider it.").

In any event, Amici's arguments are devoid of merit. As to the first argument, this Court long ago held that issues decided under federal law are justiciable here even where it is asserted that state law might provide an alternative basis for deciding the issues. *See Orr v. Orr*, 440 U.S. 268, 276-77 (1979) ("Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment. We cannot refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate non-federal ground.").

As to the ripeness argument, there is no dispute here that Respondent County formally denied the Murrs' request for a variance allowing the use of their lot. This establishes the finality necessary to ripen a federal takings claim. *See Williamson County*, 473 U.S. at 190-94 (takings claim typically ripens upon unsuccessful application for a variance, if one is available); *Palazzolo*, 533 U.S. at 620-21.

IV

CONCERN FOR SO-CALLED MERGER ORDINANCES IS OVERSTATED

Many jurisdictions have various forms of "merger" ordinances. Each has its own characteristics, grandfather clause provisions, and levels of participation by the landowners. In many cases, it is the owner who wants to merge adjoining parcels to create a better building site. Often lots are simply too small to develop, and they need to be combined to create reasonable building sites. *See, e.g., Island County v. Dillingham Development Company*, 662 P.2d 32 (Wash. 1983).

Although the present case addresses only the "relevant parcel" question, and not the merits of the takings claim, the Court should not be concerned with opening the proverbial floodgates to a rush of takings claims involving merger provisions. As Respondents argue, various forms of merger ordinances have been around for a long time. Some have been found to result in a taking of particular properties. *See e.g. Negin v. Board of Building and Zoning Appeals of City of Mentor*, 433 N.E.2d 165, 169 (Ohio 1982). But there has not been a rush of takings claims.

> Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest. We have rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment's instruction. While we recognize the importance of the public interests the

> Government advances in this case, we do not see them as categorically different from the interests at stake in myriad other Takings Clause cases.

Arkansas Game and Fish, 133 S. Ct. at 521. Finding that Lot E is the relevant parcel, thereby following *Penn Central* and *Tahoe-Sierra*, will also not cause the sky to fall. *Id.*

CONCLUSION

The Court is urged to hold that when evaluating a taking claim for a single parcel, *Penn Central* establishes a presumption that the relevant parcel to measure the degree of interference is the single parcel. In this case, there is no persuasive reason to overcome that presumption. Accordingly, the relevant parcel is Lot E.

DATED: July, 2016.

Respectfully submitted,

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